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THE POWER OF THE LEGISLATURE OVER THE RIGHT OF EMINENT DOMAIN GRANTED TO A CORPORATION.—That the right of eminent domain, though inherent in sovereignty may be delegated to corporations, public or private, is now conceded. When delegated, however, the right savors of a personal trust, and is inalienable.¹ Its exercise, moreover, may be compelled if essential to the effectuation of a legislative mandate provided the order lies within the constitutional supervisory power of the state over corporations.² It is urged further that the rights of the grantee of the power are vested and inviolate and that any legislation subsequent to the grant of the power rendering its exercise more burdensome, is unconstitutional.³ If the grantee is a public corporation this contention fails utterly. It is elementary that the relation of a public corporation to the state is legislative and not contractual;⁴ the control of the state is virtually plenary, and powers granted by the state, including that of eminent domain, are subject to abridgment or revocation.⁵ A typical case of abridgment is the enlargement by legislation of the kind of property for which compensation must be made, e. g. established businesses or property only consequentially damaged.

When the power of eminent domain has been conferred upon a private corporation the question is more difficult of determination. Against the inviolability of the grant it is contended that the power is merely a governmental license,⁶ and, consequently, is subject to alteration or revocation by the state. The rights of the individual condemnee favor this construction. Moreover, a construction which admits of an enlargement of the term "property" the taking of which requires compensation, appears eminently just. On the other hand, the right of eminent domain has been declared to be a special franchise⁷ to the accepted definition of which it obviously conforms.⁸ If granted without consideration, subsequent to the act of incorporation, it would doubtless still be deemed a license,⁹ since the law does not favor construing legislative permission as a contract.¹⁰ However, if included in the act of incorporation it would constitute a material element in the contract the obligation of which could not constitutionally be impaired.¹¹ Of course, this power would not survive revocation of the corporate charter, a possible result where the right of amendment or repeal is reserved by the state.¹² When this right is not

¹*Mahoney v. Spring Valley Water Co.* (1877) 52 Cal. 159; *Abbott v. New York etc. Co.* (1888) 145 Mass. 450; *Lyon v. Jerome* (N. Y. 1841) 26 Wend. 485.

²*Dolan v. N. Y. & H. R. R. Co.* (1903) 175 N. Y. 367; *W. M. & P. Ry. Co. v. Jacobson* (1900) 179 U. S. 287; *Worcester v. The Norwich etc. Co.* (1871) 109 Mass. 103.

³*Thompson, Corporations* § 5407; *Chesapeake etc. Co. v. Canal Co.* (Md. 1832) 4 G. & J. 1.

⁴*East Hartford v. Hartford Bridge Co.* (1850) 10 How. 511; *Demarest v. Mayor* (1878) 74 N. Y. 163.

⁵*Farnum's Petition* (1871) 51 N. H. 376.

⁶*Coe v. Columbus Etc. Co.* (1859) 10 Oh. St. 372.

⁷*Chicago Etc. R. R. Co. v. Dunbar* (1880) 95 Ill. 571; *California v. Pacific R. R. Co.* (1887) 127 U. S. 1, 40.

⁸"A special privilege conferred by the government upon individuals, which does not belong to citizens of the country in general, of common right." *Taney C. J.* in *Bank of Augusta v. Earle* (1839) 13 Pet. 519, 595.

⁹*Pearsall v. Gt. Northern Ry. Co.* (1896) 161 U. S. 641.

¹⁰7 COLUMBIA LAW REVIEW 414.

¹¹2 Morawetz, *Private Corporations* § 1055.

¹²*Adirondack Ry. v. N. Y. State* (1899) 176 U. S. 335.

reserved, it is answered that whatever immunities exist (e. g. non-liability for consequential injuries to property) when the right of eminent domain is conferred, flow from the law as it then exists and not from the charter conferring the right; that the charter continues in full force despite changes in the law.¹³ Also, it is said that the parties contract subject to subsequent changes in the law.¹⁴ This begs the question for the obligation of a contract is the right which existing law confers, and changes in that law which abridge the right manifestly impair that obligation. A better solution appears to be that, since the right of eminent domain inheres in sovereignty, policy compels an implied reservation by the state of the right to determine at any time on what terms the right of eminent domain shall thereafter be exercised. This enables the state to accord adequate protection to the individual, from a possible oppression by large interests entitled to exercise the right of eminent domain. This view is advocated in a recent New York case, *People ex rel. Lasher v. City of N. Y.* (1909) 42 N. Y. L. Jour. No. 5. Such subsequent legislation, however, can be given no retroactive effect for rights acquired under any prior exercise of the power are clearly vested.¹⁵

Of course, legislation affecting the remedy and not the obligation of a contract is unconstitutional. Accordingly, changes in the mode of assessing the compensation due,¹⁶ or the granting of an appeal from the award of compensation, where none previously existed,¹⁷ or the extension of the period within which such an appeal must be brought,¹⁸ are all unobjectionable. In some cases, the condemnor has, by legislation purporting to affect the remedy only, been deprived of a valid technical defense.¹⁹ This result, however, is questionable.²⁰

VOIDABLE PREFERENCES AND THE DOCTRINE OF RELATION BACK.—By the National Bankruptcy Act,¹ a transfer by the bankrupt within four months of the petition may become voidable as a preference. The time of the transfer is, therefore, material in determining its voidability, and the courts differ on the question whether the actual date of the transfer shall govern,² or whether the date of the right to demand the transfer shall control.³ The courts of New York⁴ and of Massachusetts⁵ advocate the former doctrine, the United States Supreme Court,⁶ the latter. *Tatman v. Humphrey*⁵ which refuses to invoke the doctrine of relation back, adopts the theory that,

¹³*M'Elroy v. Kansas City* (1884) 21 Fed. 257.

¹⁴*Pa. R. R. Co. v. Miller* (1889) 132 U. S. 75; *Drady v. Ry. Co.* (1881) 57 Ia. 393.

¹⁵*Pearsall v. Gt. Northern Ry. Co.*, *supra*; *Bohlman v. Green Bay Etc. Co.* (1876) 40 Wis. 157; *Towle v. Eastern R. R.* (1847) 18 N. H. 547; *City of Chicago v. Rumsey* (1877) 87 Ill. 348.

¹⁶*Baltimore Etc. R. R. Co. v. Nesbit* (1850) 10 How. 395.

¹⁷*United Cos. v. Weldon* (1885) 47 N. J. L. 59.

¹⁸*Gowen v. Penobscot R. R. Co.* (1857) 44 Me. 140.

¹⁹*Danforth v. Groton Water Co.* (1901) 178 Mass. 472.

²⁰*Nichols, The Power of Eminent Domain* § 324.

¹§60 a., b.

²*Long v. Farmer's State Bank* (1906) 147 Fed. 361.

³*Sabin v. Camp* (1900) 98 Fed. 974.

⁴*Matthews v. Hardt* (1903) 9 Am. B. R. 373, 383.

⁵*Tatman v. Humphrey* (1903) 184 Mass. 361.

⁶*Thompson v. Fairbanks* (1903) 196 U. S. 516.